UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE: 2703(d) ORDER; 10GJ3793	Case No. 1:11-dm-3

HEARING ON MOTIONS

February 15, 2011

Before: Theresa C. Buchanan, Mag. Judge

APPEARANCES:

John S. Davis, Andrew S. Peterson and Tracy D. McCormick,
Counsel for the United States

John W. Keker and John K. Zwerling,
Counsel for Defendant Appelbaum

John D. Cline and Nina J. Ginsberg,
Counsel for Defendant Gonggrijp

Cindy A. Cohn, Aden J. Fine and Rebecca K. Glenberg,
Counsel for Defendant Jonsdottir

William B. Cummings, Counsel for Inter-Parliamentary Union

NOTE: The case is called to be heard at 10:30 a.m. as follows.

THE CLERK: The United States of America versus Jacob Appelbaum, et al., case number 11-dm-3. Will counsel please note their name for the record.

THE COURT: Good morning.

MR. DAVIS: Good morning, Your Honor. John Davis for the Government. With me at counsel table is Andrew Peterson and Tracy McCormick, we are all Assistant United States Attorneys.

THE COURT: All right. Good morning.

MR. ZWERLING: Good morning, Your Honor.

THE COURT: Good morning.

MR. ZWERLING: John Zwerling for Mr. Appelbaum. I would like to introduce John Keker, who has been admitted pro hac vice. I would like to introduce him to the Court, he is from San Francisco.

THE COURT: All right. Good morning. Nice to meet you.

MR. KEKER: Good morning, Your Honor.

THE COURT: Good morning, Ms. Ginsberg.

MS. GINSBERG: Good morning, Your Honor. Nina Ginsberg on behalf of Mr. Gonggrijp. And I have with me John Cline, who has been admitted pro hac vice.

THE COURT: All right.

MS. GINSBERG: He is also from San Francisco.

THE COURT: Good morning.

MR. CLINE: Good morning.

MS. GINSBERG: Thank you.

THE COURT: All right. This comes on the defendants' two motions. And who is arguing these on behalf of the defendants, Mr. Keker? Excuse me, the petitioners rather.

MS. GLENBERG: Your Honor, I am sorry, we have more attorneys to introduce.

THE COURT: Oh, I'm sorry.

MS. GLENBERG: I'm Rebecca Glenberg, local counsel for Birgitta Jonsdottir. And with me are Aden Fine and Cindy Cohn, admitted pro hac vice.

THE COURT: All right. Good morning. Is there anyone else?

MR. CUMMINGS: One more, Your Honor.

THE COURT: I see. How are you?

MR. CUMMINGS: William Cummings on behalf of Inter-Parliamentary Union, Your Honor. We filed a motion for amicus.

THE COURT: Yes. And I granted that. Did you want to argue today too?

MR. CUMMINGS: We wanted the amicus to be approved, that's all, Your Honor.

THE COURT: I have done that.

MR. CUMMINGS: Oh, good. Thank you.

THE COURT: Okay, thank you. So, this is on the petitioners' two motions. Who is going to argue these?

MR. KEKER: Your Honor, there are several motions. I am John Keker representing Mr. Appelbaum.

THE COURT: Good morning.

MR. KEKER: I was going to argue the motion to vacate. Ms. Cohn is going to argue the motions to unseal that, to the extent that they need to be argued, the ones that are not substantive.

And Mr. Fine is arguing the substantive motion to unseal, namely the application that led to the December 14 order.

THE COURT: Okay. I wasn't really planning to have much argument on the motion to unseal the documents. I just needed the positions of both parties. And I understand there are a couple extra documents that I need the position of the defendant-- the Government on. But I don't think those are really controversial. That's just something I have to pick through.

So, did you want to go ahead and argue the first motion?

MR. KEKER: Yes, ma'am, I would like to. I would like to.

And as I said, I represent, along with Mr. Zwerling and Mr. Sears, Jacob Appelbaum, who is an American citizen. I am arguing the motion to vacate. And I have been asked by the other two movants to make an argument that really affects all three of us.

THE COURT: Okay.

MR. KEKER: So, if they need to supplement it, they will, but we're not going to, we're not going to triple-team it.

THE COURT: All right, thank you.

MR. KEKER: And I'm sure you wouldn't let us.

THE COURT: No, I wouldn't. We are known as the Rocket Docket, as you know.

MR. KEKER: We guessed, we guessed, Your Honor.

The motion to vacate is directed to the December 14, 2010 order that the Government obtained ex parte. There has been some discussion in the briefs about a limitation that Twitter and the Government have worked out, but as far as we know and based on our discussions with the Government they have not promised or otherwise officially limited that order.

So, my remarks are being directed to the order that was issued by this Court on December 14, 2010 and which we saw after it was unsealed in January of this year.

In that order, as the Court knows, the Government demands information about all the connections via Twitter that

certain named individuals made, who sent, who received, where they were. I will talk more about that. When they were sent, the IP addresses. Basically a map of the association of the people who are bringing this motion.

And it is indeed ironic that we're making this argument today given the events recently in Egypt and Tunisia, this whole idea of the political use of social networking mechanisms like Twitter has been, as I know the Court is aware, very much in the news. And it goes to the essence of what we're concerned about here.

They applied for an order under 18 U.S.C. 2703(d), the Stored Communication Act. That requires, as we said very strongly in our papers, that requires a very specific statement of articulable facts showing that what they are asking for is relevant and material to an ongoing criminal investigation.

Needless to say, we haven't seen the application that accompanied that order. You have. It makes it a little awkward for me to be standing in front of you saying whatever is in that application does not support the order that was given, but I take solace in the fact that you recognized that the order was presented to you ex parte. We didn't have a chance to make any of the arguments that were, that were before you. And I doubt very much that the Government brought some of the arguments that we're bringing before you when the

order was presented.

So, let me jump in. I mean, the first--

THE COURT: And you can be assured I have read everything. So, you can just address what you think needs to be highlighted or added to.

MR. KEKER: Okay. Well, there is enough back and forth and intermeshing of arguments that I just wanted to make sure that our position was very, very clear.

THE COURT: Sure.

MR. KEKER: The first and foremost reason to vacate this order is statutory. And that is, whatever the showing they made, whatever is in those papers, they couldn't justify an order as broad as the one that they obtained on December 14.

Mr. Appelbaum, I will use as an example our client, he is a major tweeter. He at the time of these papers had more than 9,000 tweets. He had 10,000 followers. He talked about all kinds of political matters on them. Some of them having to do with Wikileaks, but a lot of them having nothing to do with Wikileaks.

The order asked for the IP addresses that would allow the Government to figure out who Mr., where Mr. Appelbaum was at all times, was he at home, was on the road, was he at his office, for a one-year period. Later they narrowed it to a six-and-a-half month period. But still, it's

a huge amount of information that is not public.

There is no possible justification that they could have put in that application to support getting all of his IP addresses every time he published something of a political or personal nature. And there is no possible justification for learning his location every time he sent a tweet no matter what the application says.

So, the first--

THE COURT: What do you mean no matter what the application says?

MR. KEKER: Well, it can't possibly-- I guess what we're saying is, the application, I can just imagine-- I mean, it has something to do with Wikileaks. It has something to do with these are people who know the Wikileaks founder. The Government is interested in seeing what the connections are between these people and the Wikileaks founder. All of that I can imagine.

What I can't imagine is how that leads to an order as broad as the one they asked you for. That's really our point.

THE COURT: Okay.

MR. KEKER: I can't-- And I guess, let me back up and say, if you grant, Mr. Fine will be arguing this, but we've asked that the application be unsealed and we've asked once it's unsealed for an opportunity to take a look at it

just as though it were a search warrant affidavit and raise any issues that we see and get much more specific than we're able to do now.

What I'm here to say though is because of the breadth of the order, it can't, and whether or not there is a core of the showing that they made that would justify some order from this Court, it wouldn't justify an order as broad as the one they asked for.

And that leads me to the second reason. So, the first reason is statutory. And we're asking you to exercise your discretion to vacate the order.

The second reason is constitutional. And that is the doctrine of constitutional avoidance. If there is a constitutional issue here that would have to be dealt with in order to uphold this order, if it can be avoided by some lesser means than getting to the constitutional issues under the First and Fourth Amendment, it should be.

And that's what the Third Circuit opinion to some extent was about that we've cited. There the magistrate set aside, and they sent it back to the magistrate for a further factual showing, that set aside a 2703(d) order because the magistrate thought that the Government should have gotten the search warrant.

The Third Circuit said, well, we don't agree with your reasoning, but there has got to be a lot more work here

done in a factual way to decide whether or not this order would violate the Fourth Amendment. And it's that that led them to say the magistrate has discretion to say, no, I'm not going to do this and to go ahead and require the Government to get a warrant rather than have the hearing that would be required under the Third Circuit opinion.

So, that's one thing that we're asking for, for you to exercise your discretion that way.

Let met talk about the constitutional issues that you would be avoiding if you did that. And I want to start with the Fourth Amendment.

The order allows the Government to follow Mr. Appelbaum and others electronically for an extended period of time and learn when he is at his home, when he is at his office, when he's traveling, but primarily when he is in protected places, places protected by the public amendment to find out what he is doing.

And when the Government can know what you're doing in your home or in your office, can get information that it couldn't get by visual surveillance, that is a search under the Fourth Amendment. It's protected by the warrant requirement, and probable cause is required to get a warrant.

The cases that we've cited, and I know you've read and looked at in the briefs, include Karo, which dealt with a beeper that ended up inside a house. And maybe most

importantly Kyllo, which was decided 15 years later. And Justice Scalia made no uncertain-- I mean, Justice Scalia said, when you find out what's happening inside somebody's house, in that case it was somebody sitting outside trying to figure out if heat lamps were on, when you find out--

THE COURT: Well, aren't you overstating it just a little bit in terms of what this, what this order goes to in terms of what information the Government would be seeking as to these petitioners?

As I can see it, they're not asking what these people are doing in their homes or other private places. They are asking for location data primarily. Isn't that correct? I think you're exaggerating this quite a bit.

MR. KEKER: I have been excused of exaggerating all my life, Your Honor. And I'm sorry, I won't, I will try not to do it.

No, but I don't think I'm exaggerating. They're asking when tweets are being published, when certain political speech is going out of the house, because that's public--

THE COURT: Right.

MR. KEKER: Where were-- Or not going out of the house. Where were you when that happened? They're getting location data that ties to messages.

THE COURT: That doesn't exactly tell them what a person is doing otherwise in their house, does it?

MR. KEKER: Agreed. No, it doesn't.

THE COURT: Okay.

MR. KEKER: It doesn't. And both Karo and Kyllo talk about that. Does it need to be intimate detail of what's going on in the house. And the answer Justice Scalia tells us is, no, it doesn't have to be intimate detail.

It can be information which coupled with inferences allows you to gather information, gather evidence that is useful to this ongoing criminal investigation.

The issue is, is it a search. And the answer from those cases is, yes, it is a search. It doesn't have to be particularly specific. Because that was one of the major arguments that the Government made that, oh, it's just, Karo was limited to intimate details, and kind of more generic information coming out of the house is not important.

THE COURT: Well, how is this any different than the scenario that you just stated where they would observe the defendant, follow him, know where he is? By following him, you know, around town, seeing when he goes home, seeing when he is at his office or other places, and then matching that with his public tweets.

How is that any different?

MR. KEKER: One of the ironies about this is that there are lots of ways to get the information, and some of them are legal and some of them require a warrant. And that's

what we're saying.

So, to the extent that they could get the information other ways by visual surveillance, by having an informer inside the house, by getting the roommate to tell them what's going on at all times, I mean, those things are different.

THE COURT: But again, you're going into areas that they're not requesting, having a roommate saying what's going on in the house, having someone else tell them where he is at all times. That's not what-- Or what he's doing at all times, I think you said. That's not the kind of information the Government was seeking.

MR. KEKER: The Government here--

THE COURT: What they're seeking, I think you admitted, it's location data and timing data, stuff that they could have observed but for the fact that that would be impractical.

MR. KEKER: Yes. But that applies, I suppose that applies to every Fourth Amendment case. There usually is some other way if something else happens--

THE COURT: Well, I understand what you're saying, but you keep stepping into beyond what I think this order is directed to by implying that they are trying to get information about what these petitioners are doing inside their house other than just sending a public tweet. Or inside

another, inside their office other than sending a public tweet.

MR. KEKER: I don't mean to do that. But what I'm saying is that using the mechanism that they are seeking in this order, namely a 2703(d) order--

THE COURT: Right.

MR. KEKER: Is, amounts to a search under the Fourth Amendment because of the nature of the information that they're seeking about what's happening inside the house.

And that information about what's happening inside the house could have been obtained other ways, you're right. And it's not that the information is automatically protected, kind of protected no matter what. It's protected from the Government searching for it this way without a warrant. It's covered by the Fourth Amendment. That's what I'm--

THE COURT: All right, I understand.

MR. KEKER: I'm saying. And I'm not attempting to exaggerate what they're learning inside the house. They are learning where you were when you were doing all this tweeting, and they are learning it over a long period of time.

THE COURT: Okay. That's essentially it.

MR. KEKER: Yes, ma'am.

THE COURT: Okay.

MR. KEKER: And to get it this way is a search under the Fourth Amendment. That's our position.

And to avoid, to avoid reaching that or dealing with that, or dealing with the arguments that they make about, oh, there is no expectation of privacy because of this or that, to avoid that we're asking that you apply the statutory remedy of vacating the order because they didn't make an adequate showing. And then we don't get in, you don't have to write a Fourth Amendment opinion about this, I guess is what I'm saying.

The Government does say with respect to what we're talking about right now, that there is simply no expectation of privacy about your whereabouts when you're logging onto Twitter. And to just nail the point, Karo, Kyllo, Maynard are all cases that we've cited that say otherwise.

If there is a question about whether or not there is an expectation of privacy in this information, then there ought to be a much bigger showing than the one that we have here where both sides are saying what they think the expectation of privacy is.

We think it would require a hearing like the Third Circuit told the magistrate judge in the Third Circuit opinion to do. And you'd have to figure out a couple of things. One is that you would have to figure out what people expect with respect to whether or not the Government can track their movements and association in the way that this order does.

As Justice Scalia said in Kyllo, this expectation of

privacy rubric that we've all heard since 1967 in Katz is sort of circular. I mean, it becomes what the courts say it is.

But what our point is, that this is not phone records where you know on your bill you're going to get a bill that says who you've called. I mean, it's not bank records where the courts have talked about voluntarily turning things over. This is something different.

Nobody-- And in a hearing we believe we could show that not nobody, but most people, the vast majority of people have no idea that Twitter collects the information about their whereabouts and--

THE COURT: Well, your clients seem like pretty knowledgeable people, and they did agree to Twitter's privacy policy, did they not?

MR. KEKER: They-- I wouldn't accept that they agreed to Twitter privacy policy.

THE COURT: They were informed of it at any rate--

MR. KEKER: They went ahead with Twitter in the face-- I have had those things pop up on my screen every time I have gotten a new program. I think their-- I have--

THE COURT: So, you don't read them?

MR. KEKER: I have never read the whole thing. So, saying that they agreed to it, it was jammed down their throat. Yes, it appeared on their screen, there is no question about that.

THE COURT: Well, it would be a condition of creating a Twitter account, would it not?

MR. KEKER: Correct, that's true.

THE COURT: Okay. And they agreed to that, correct?

MR. KEKER: They created a Twitter account, that's certainly true.

THE COURT: All right. Subject to that. Okay.

MR. KEKER: And that is one factor, I totally agree, that would be as useful factor for the Government in this hearing where you tried to figure out what a reasonable expectation of privacy is. But I would argue that there would be ways to overcome that.

This is something really sort of brand new which, if allowed, permits the Government to know a lot more electronically than people are used to them knowing. When you're at home, when you're at your office, when you're elsewhere, what you're saying when you are at those places.

So, our position is that if the Fourth Amendment argument needs to be addressed, there ought to be a hearing on the Fourth Amendment to determine what the reasonable expectation of privacy is and whether or not society can tolerate that reasonable expectation of privacy, which is the other prong.

THE COURT: All right.

MR. KEKER: So, unless you want, unless there is

more to talk about on the Fourth Amendment side--

THE COURT: What authority do you have for the noncitizens living abroad having rights under our Constitution?

MR. KEKER: The Constitution as I understood-- The case that the Government cites, as you know, of course, deals with a kidnapping and virtual mugging that happened outside the United States in Mexico. It's my understanding that the Constitution of the United States applies to things that happen in the United States.

This is an order issued by a United States court which is bound by the Constitution to a U.S. company which is covered by the Constitution whose records are all in the U.S. where they are covered by the Constitution that affects United States citizens like my client, Mr. Applebaum, who is, needless to say, protected by the Constitution. And the fact that some non-American citizens participate in this gathering or are part of this gathering of information doesn't make the Constitution go away.

THE COURT: Okay.

MR. KEKER: And we believe that the Constitution applies fully to these Twitter records. We think that Twitter, if they were here, would want it to.

And the idea that American-based social networking systems or server systems or Internet systems, which by

definition, operate in cyberspace all over the world, aren't protected and their records aren't protected by the U.S. Constitution is, we believe is wrong.

THE COURT: Okay. I understand. Thank you.

What's the Government's opposition to this?

MR. KEKER: And there are cases cited at footnote 9 of our reply brief --

THE COURT: Okay.

MR. KEKER: -- that we think answer that question. So, let me move very briefly to the first--

THE COURT: Oh, I'm sorry, I thought you were finished. Go ahead.

MR. KEKER: I'm almost finished, Your Honor.

THE COURT: Okay, go ahead.

MR. KEKER: Let me talk briefly about the First Amendment. There can't be much question that the original order seeks information about associations. In NAACP versus Button a Government subpoena that asked the NAACP for all, a list of its members was challenged under the First Amendment. In that case there were other ways that they could have gotten the information, but the subpoena was challenged because it unnecessarily burdened the rights of association. Our argument here is somewhat, is somewhat the same.

The original order seeks information that really could map your affinity groups, who you communicate with, when

you communicate with them, from where you communicate with them. It really does allow a mapping of who your association is.

And again, I am back to Egypt, Tunisia. I mean, imagine if the Government, and I think the Government did try to get that information because it's incredibly useful to know what the political opposition is doing and who they are talking to and when. When those groups are brought together on social networks around an issue, whether it's the revolution in Egypt or Wikileaks or any other political event, the First Amendment has to come into play.

How much Government-- And the question is how much Government surveillance and mapping of the affinity groups does it take to chill the First Amendment rights of free speech and association? If I learn that by communicating with Jake Appelbaum or following Jake Appelbaum or learning his political views Big Brother will have my name in a file, will I stop paying attention to those tweets?

So, at a minimum we believe that Fourth Circuit law and U.S. law requires a balancing of what the chill on the First Amendment rights of association and free speech are against the Government's need for the information. And it can't just be blithely ignored by calling them business records.

You have got to ask, I mean, how much chilling of

speech is there? Is the order too broad? Does the Government need all these documents? Does it outweigh the chilling of speech?

And again, that leads to a hearing. And again, that leads to the doctrine of constitutional avoidance, which we think is best answered by simply vacating the order, letting the Government regroup, figure out what it wants to do. It has other ways to get at least some of this information, as you know.

And with that, Your Honor, if I don't have any, if you don't have any questions, I will sit down.

THE COURT: I don't. Thank you.

MR. KEKER: Thank you.

THE COURT: Why don't we go ahead and have Ms. Cohn argue the motion to unseal.

MS. COHN: Your Honor--

THE COURT: Are you not-- I'm sorry, you're not arguing--

MR. COHN: My colleague, Mr. Fine, is going to argue the part of the motion to unseal that you--

THE COURT: Okay, Mr. Fine. I'm sorry, you're right. I did write that down. Sorry.

MR. FINE: Good morning, Your Honor.

THE COURT: Good morning.

MR. FINE: Aden Fine. And once again, I'm going to

be speaking on behalf of all the movants here.

THE COURT: All right.

MR. FINE: And this motion to unseal deals with our attempt to unseal the remainder of the documents that were associated with the December 14 order to Twitter. And as well, we are seeking to unseal any other similar orders and applications that were issued to other companies.

Your Honor, this motion deals with the Government's attempt to obtain private information about Internet communications and the Government's attempt to do so in secret.

They shouldn't be able to get this information in the first place, as Mr. Keker just explained. But above all, they shouldn't be able to do so in secret. That's not how our system works, and it shouldn't be permitted here.

In our judicial system there's a clear presumption of open access to court documents. And it's the Government's burden to overcome that clear presumption. They haven't met that burden here and they can't meet it here.

In these specific circumstances with these specific documents, the Government cannot demonstrate that its interests in maintaining secrecy here heavily outweigh both the movants' and the public's significant interest in obtaining access to these documents.

And before we get into the law, I think it's

important to understand exactly what's at issue here and who's involvement. The movants are three individuals who, like many people, use the Internet to communicate with individuals around the world on a variety of different subjects.

These individuals have apparently been swept up in the Government's investigation into the Wikileaks Web site. That investigation has been extremely high profile both here and around the world. And it's safe to say that the entire world is watching to see what the American Government's response and what our courts' responses will be to this highly controversial and politically charged matter.

And this is not just an ordinary request for information by the Government either. Here the Government has chosen not to use a warrant, but to obtain a court order based on showing less than the probable cause that would have been required to get a warrant. And they have done so, as Mr. Keker just explained, in order to get detailed information about individuals' Internet communications, including private information such as who they direct messaged with. Which is Twitter's way of private messaging.

So, in these circumstances, Your Honor, the Government's burden to overcome the clear presumption of open access is especially high, and they haven't met that burden here for several reasons. First, the Court has already unsealed the Twitter order. And the Court has already

determined, based on the Government's request to do so, that it's in the best interests of the Government's investigation to remove that secrecy.

Given that, there is no reason, let alone a compelling reason, why the Government needs to maintain secrecy over the rest of the Twitter dockets and over the other similar orders and applications.

The disclosure of the Twitter order has revealed two key facts. First, it's confirmed that there is this investigation. It's confirmed the existence of the investigation.

Second, and critically, it's confirmed that the Government is attempting to get information about movants' communications.

Those two facts are critical because as a result of them, the traditional reasons for secrecy, such as not wanting to tip off witnesses or subjects or targets, not wanting to risk the potential destruction of evidence, and not wanting to risk potentially exposing innocent parties to the public's eye and to the public scrutiny, none of those traditional reasons for secrecy are still present here.

And as a result, the Government simply cannot meet their burden. And that's common sense, but it's also the clear law. And the Fourth Circuit Court has made clear that when information is already publicly known, the Government

cannot have a compelling interest in keeping secrecy over that information. And that's the Virginia state, the Virginia Department of State Police case makes that clear, Your Honor.

Simply put, the Government can't have it both ways. They can't say on the one hand it's in the best interests of the investigation to remove the secrecy and then turned around and say, but we still need to keep everything secret. They simply can't do that here, Your Honor.

And because the Court has already determined that it's in the best interests of the investigation to remove the secrecy, the Government simply cannot meet their burden.

THE COURT: Don't you think that there is a difference though between revealing the existence of an investigation and the details of what the Government is looking at?

MR. FINE: Of course there is a difference, Your Honor.

THE COURT: Sure. And wouldn't that be a problem with regard to releasing the contents of the affidavit?

MR. FINE: The release of the order itself has revealed those two key facts. Not just that there is the existence of this investigation, but it's revealed what information the Government is seeking. They are seeking information about movants' communications.

As a result--

THE COURT: But the basis for that and why the Government is seeking that information, why wouldn't that be subject to-- Because it's the reason for the investigation, because it's the basis for asking for this, the details of the investigation. Why wouldn't that be subject to being held private at this point--

MR. FINE: The only reason, the only reason that that information is ever held subject to secrecy is if it's necessary to accomplish the traditional reasons. You don't want to tip people off. You don't want somebody to go out and destroy evidence.

THE COURT: All right.

MR. FINE: You don't want to expose innocent people to the public's eye if they are eventually not going to be prosecuted.

None of those reasons are present here because they revealed the Twitter order. We now know they are trying to get this information.

If any of these risks-- If there were any need for secrecy, that would have existed before the Twitter order was released. Now that it's released, everything has changed, Your Honor. And the only thing that remains is just facts.

This is not, we're not trying to get into the Government's investigative files or into grand jury proceedings.

THE COURT: Well, wouldn't you be doing that by asking to have this order, to have the affidavit released? Which would presumably detail why the Government is looking at the associations and why that's pertinent to their investigation.

MR. FINE: Yeah, but, Your Honor, the Government is not entitled to secrecy over facts just because they don't want the other side to know them. There has got to be a reason for that. Our system isn't based on secret evidence and secret trials.

THE COURT: Well, that's the whole point though. We aren't at the point of a trial. This is just the investigation.

And I think, don't you think that there is a different standard there in terms of the Government having to release everything that it already has established in an investigation or suspects in an investigation and the reasons for why they want more information?

MR. FINE: We're not asking for everything that they have.

THE COURT: Well, that's what you're asking for if you ask me to unseal that affidavit.

MR. FINE: We're asking for everything that they gave the Court to persuade the Court to issue a judicial order.

THE COURT: Right. What's the difference?

MR. FINE: There is a big difference, Your Honor. We're not trying to conduct discovery here. We're trying to know what are the facts that the Court was given by the Government --

THE COURT: Yes.

MR. FINE: -- to reach its conclusion.

THE COURT: Why is that not, why does the Government not have the right to have that private, to have that secret at this point when there has been no charges brought, nothing that involves these petitioners that would, you know, elevate this to the next step where you would have the right to see that?

MR. FINE: Your Honor, the Fourth Circuit has made clear that just because something is an ongoing criminal investigation, even preindictment, that's not sufficient to warrant the extraordinary measure of sealing documents.

Here the Government has failed to show why in these specific circumstances with these specific facts postrelease of the Twitter order, why they still need secrecy. And the Fourth Circuit has made clear that absent that specific showing, it's improper to seal documents. And that's why we're here, Your Honor, why we're asking you to do this.

THE COURT: I understand. Thank you.

MR. FINE: The only real fact that the Government,

the only real risk that the Government points to that might unfold if the rest of these documents are unsealed is that they claim that it hasn't yet been publicly confirmed who these other companies are that may have received these other orders. But that normal risk of witness intimidation or witnesses fleeing is simply not present here, Your Honor.

The companies that likely received these other orders are huge companies over whom the movants have little or no influence. These companies are not going to flee and they are not going to destroy evidence just because we're here seeking to unseal these documents.

Besides, if there were any risk that the movants would attempt to influence these companies, which they are not going to do, but if there were any risk, that would have been caused by the Government unsealing the Twitter order in the first place. Movants obviously know which other companies they have accounts with.

So, there is no-- The key I guess here, Your Honor, is there is no additional risk that would be posed by unsealing these additional documents.

The second reason why the government cannot meet its burden here, Your Honor, is that movants have a strong reason for needing these documents unsealed. They need these documents unsealed so that they can properly challenge the underlying orders which, in our view, implicate their

constitutional rights. Absent unsealing both the Twitter application and the other applications and orders to other companies, movants will effectively be prevented from doing so. And that's simply not permissible, Your Honor.

The final reason, and this is a critical reason why the Government cannot overcome their burden, their heavy burden in these circumstances, is that the public has an immense interest in having these documents unsealed.

As I mentioned, this investigation has sparked an intense national and international debate over what the proper response is to this Wikileaks Web site. And it's safe to say that this story has consumed the press, the American public and the current administration. And unsealing these documents would greatly contribute to the public's ability to meaningfully participate in this ongoing debate. And it would greatly benefit the public to have a better understanding of what our Government's response has been and what our courts' responses have been.

And unsealing these documents would also ensure that the judicial process is functioning properly. That Government is not overstepping its bounds. That reasoned and appropriate decisions are being made. And that fairness and justice are occurring and that they are not being sacrificed just because this is a highly controversial and charged matter.

Those are the reasons why for decades the Supreme

Court and the Fourth Circuit have made crystal clear there is a reason why our judicial system is open. And the reason is that we need to allow the public to serve as that watchful eye on our Government's operations and our courts.

And the Government is trying to avoid that here. I understand we don't know all the facts that they have presented in their affidavits, but just because they don't want us to know that isn't a sufficient reason under the clear case law for sealing that information. They have presented it to the Court, and the public and movants are entitled to get that information.

On the other side of the balance, what the Government's argument essentially boils down is simply they broadly assert that this is an ongoing criminal investigation, it's preindictment, and that, therefore, there must be secrecy per se no matter what.

But the Fourth Circuit Court has made clear that that is not a sufficient reason to overcome the Government's heavy burden of justifying closure. And again, in the Virginia Department of State Police case, which is at 386 F.3d 567 at 579, the Fourth Circuit made clear that although there is a general interest in maintaining the integrity of ongoing criminal investigations, that enough is not sufficient to warrant sealing documents.

Instead, the Fourth Circuit made clear the

Government has the burden, and again they haven't done that here, of showing specific facts and specific reasons why this particular investigation will be compromised if the remainder of the documents are unsealed.

Given that we already know the Government is attempting to get movants' information and that we already know about the existence of this criminal investigation, the Government simply can't meet that burden.

One final point, Your Honor. It appears that there is still not a public docket for any of these materials that we're discussing here today. And the absence of that public docket is simply not permissible.

And the Fourth Circuit Court has made repeatedly clear, and it's very clear in a long line of cases, that judicial records need to be put on the public docket in a manner sufficient to provide the public with notice that the Government is attempting to seal certain things in a sufficient manner to provide the public with an opportunity to challenge or to object to such sealing.

And that principle holds true even in time sensitive, otherwise secret matters such as search warrant proceedings, and the Baltimore Sun versus Goetz case makes that crystal clear.

In those kinds of situations that otherwise would be kept secret, the Court doesn't necessarily need to docket the

material in advance of sealing the materials, but the solution that the Fourth Circuit came up with, and it makes perfect sense, is once the order is sealed, once there is any sealing, you have got to put that on the public docket so that anybody can come in and say, wait a second, why is this sealed? I object. That hasn't been done here, and it needs to be done, Your Honor.

So, movants request that the Court at a minimum order that the docket, that there be public docketing of all the materials that were associated with the December 14 order to Twitter, and that there be public docketing for all the other orders that the Government obtained and all the other applications that the Government submitted in order to get those other orders.

We still don't know about those documents, or I assume they were all put under seal, but the solution is the Court has to order the Clerk's Office to put all those on the public docket.

THE COURT: Okay.

MR. FINE: Thank you, Your Honor.

THE COURT: Thank you, Mr. Fine.

Who is arguing this for the Government?

MR. DAVIS: Your Honor, I will address the motion to vacate. Mr. Peterson will address the unsealing issues.

THE COURT: All right.

MR. DAVIS: Your Honor, the parties have stated that something brand new is happening here. And, of course, as this Court knows, nothing of the kind is occurring. This is a routine 2703(d) application and order, lawful in all respects for subscriber information and for connection records.

There is no content involved. There are four accounts identified. There is a six-and-a-half month period particularized in the affidavit. There is nothing burdensome, there is nothing voluminous, and there is nothing required of the parties here.

This is a standard, as this Court knows very well, investigative measure that is used in criminal investigations every day of the year all over this country. And we don't back away from that. This is a routine 2703(d) case.

I'd just make a few points. One is that the parties say almost nothing about the standing limitations. And this is an unusual statute in that there is a very clear standing statute right in the Electronic Communications Privacy Act. Section 2708 says that non-constitutional grounds cannot be raised.

And so, although the parties say we raise first and foremost a statutory challenge, the same statute says they can't do that. And there is good reason for that. It's because Congress has designed an ex parte proceeding that allows for efficient resolution of criminal investigations and

does not allow for parties to bring what are like motions to suppress and long inquiries about those decisions in the first instance.

The subscribers only have the remedies in that statute. And in this noncontent case, they're not even close to having a statutory remedy. And we would urge the Court to make that clear in resolving this matter. There is no standing here to raise a statutory claim.

As for the statutory challenge, this Court has already determined based on the application filed that there are specific and articulable facts that meet the standard in the statute, and that is as it should be. The Court has made that finding. There is no motion to suppress allowed here.

And the parties' best argument is, well, maybe there is connections that someone has made that don't relate to the criminal investigation. And I would say that is a certainty here. That is, there are, I am sure, connection records of IP address connections to the Internet that turn out to have nothing to do with the criminal investigation.

But again, that is, as it should be, an efficient and fair criminal investigation. And these records are no different than when a grand jury subpoenas telephone toll records and gets a bunch of phone calls, not all of which are relevant and material to the case. Or a bunch of credit cards that show transactions, only some of which are relevant.

But surely the law does not require and certainly the providers of this world don't want a regime where only, where a relevancy decision has to be made at the outset. That's not the way investigations function. There is no reason it should function that way here.

Your Honor, the parties make much of the Court's and urge the Court to exercise its discretion to even if, assuming that the Government has met the specific and articulable facts standard, to exercise its discretion to say, well, in this case we think the Government should have to provide more, it should have to provide probable cause and meet the Fourth Amendment standard. And they base that argument, of course, on the Third Circuit opinion.

We think, respectfully, that the Third Circuit opinion is unsatisfactory in that respect. And we think even the concurring opinion in that same opinion makes clear that it is an unworkable situation for magistrate judges around the country where there are no standards and a judge has the discretion to say, well, here we're going to require more even though the Government has met the standard.

And that's not to say the Court doesn't have discretion. Of course the Court has discretion to make or not make orders under 2703(d) for lots of reasons. For instance, the Court could say, well, you've met the factual showing, but this is an unusually voluminous court order, or the amount

you're asking for is too much, or there are other undue burdens. Those kinds of considerations are right in the statute. Of course the Court retains discretion to determine those kinds of issues.

What the Court doesn't have discretion to do is to change the rules in the middle of a 2703(d) proceeding and to say, I acknowledge that you have met the factual threshold required in the statute, but I am going to raise the bar. And that, that is not, that's the opposite of reasoned discretion, and it's the opposite of the rule of law.

And we strongly believe that the Third Circuit opinion in that respect is not destined to be celebrated and emulated in other courts around the country.

Turning now to the Fourth Amendment argument. Our argument is quite simple. This case is controlled by Smith v. Maryland. Just as in pen registers from a land line phone inside a home, there is no Fourth Amendment issue.

So too are the IP address records here in the same guise. We also say, as two Courts of Appeals have already said in Forrester and Christie, there is no reasonable expectation of privacy in voluntarily conveyed IP addresses.

It's a remarkable argument and an excellent-- There is a lot that is being done in this argument, and I admire it in many ways, but what the defendants are doing is they're weaving together two strands of Fourth Amendment law. One is

the Karo and Kyllo strand that has to do with the private, the private events that occur in one's own home.

And the second strand of Fourth Amendment law is the privacy interest in public movements and going around and moving from place to place that come up in cases say involving GPS and tracking devices.

And the two doctrines are woven together, but consider the argument just briefly. First of all, IP addresses don't show location with precision. This is not location information in the same sense that GPS information is. It is less geospecific than things like a land line phone telephone call is, or certainly a tracking device.

Also, Karo and Kyllo involve surreptitious technology that was implanted by the Government. I mean, Karo is the tracking device that was put inside the can of ether and painted up, and this is a big surreptitious step by the Government.

That is completely absent here. The Government hasn't done anything. These are just ordinary computers that are functioning the way everyone knows computers function. There is nothing secretly installed here. And to say that this raises a Karo issue is creative to say the least.

We also think that the, that routinely subpoenaed phone, routinely subpoenaed records, including phone records, show activity in a home much better than these IP address

connection records, again as in land line phones. Or traveling is shown in credit card record cases where transactions show where someone was and making what purchase or ATM deposit or whatever it is. Those kinds of things are subpoenaed all the time, and we don't hear that this is a Fourth Amendment violation.

We also commend to the Court footnote 2 in Bynum. The Fourth Circuit Court hasn't said much about this, but it has said in the Bynum case that IP addresses are, quote, numbers that Bynum never possessed.

I mean, the Fourth Circuit is looking at IP addresses and noting that IP addresses are generated automatically by an ISP. And, of course, in a dynamic IP address situation, they are assigned from a battery of numbers and they change all the time.

To say that Bynum possessed this number, that it's a paper in effect under the Fourth Amendment, is a bit of a stretch. And again, the Fourth Circuit doesn't make a holding there, but it is-- Again, to say that an IP address is possessed even in the same way that a phone number is possessed, is taking it far.

Lastly, Your Honor, about the Fourth Amendment. As to the Third Circuit case, there is a great deal made of the Third Circuit opinion in the parties' excellent papers in this case. But note what the case actually does. It rejects the

conclusion that a search warrant is required for cell site location information. It cannot accept the view of the magistrate judge in that case that cell site location information can be considered information from a tracking device.

It finds no evidence that historical CSLI as it is called, even when focussed on GPS cell phones, extends to privacy interests in the interior of the home. And it holds that cell site location information is obtainable under 2703(d) without probable cause. That is, the holding of that case is not at all, doesn't get the defendants or the parties very far.

So, we think that Smith v. Maryland is clear. The Courts that have looked at this have made that holding. And we would urge the Court to do the same.

As to the First Amendment, I will only say, this is not about association rights. And it's not about politics. It's about facts and evidence. And certainly communications among people may show associations, but the Government in this case is not seeking a membership list. It is focusing on four Twitter accounts. It is a subpoena not to these subscribers. It is to an American corporation for business records.

It is not for content. It doesn't have anything to do with the speech in the case. And it is only a search for what are like toll records from a phone company.

And it also is about things that are of their nature public statements. Tweets are public statements uniquely and widely available.

There is no showing of overbreadth. This is a narrowed 2703(d) order. There is no showing of bad faith, and the parties don't allege that.

And so, we reject-- To some extent it's hard to discern what is the First Amendment claim that the parties are makings.

Lastly, Your Honor, I wanted to address very briefly the international comity question which pertains to Ms. Jonsdottir who is a member of Parliament in the nation of Iceland. I wanted to make clear that we do not agree and concede, as is stated in the reply brief, that this order would violate Icelandic law. We don't think the parties have made that showing.

They have shown that there is an article in the Constitution that says that a legislator may not be subject to custody, and a criminal action may not be brought against that legislator. This is not a criminal action against Ms. Jonsdottir or anyone else at this point.

It also says that no member of the Parliament may be held accountable for statements made by that person in the Parliament except with consent. But this is not about Parliamentary statements or Parliamentary events.

This is a case where Ms. Jonsdottir's status as a Parliamentarian is incidental and not integral to the investigation into the facts sought. And there is no hardship or burden on Ms. Jonsdottir as a Parliamentarian or on the Parliament of Iceland by this 2703(d) order.

But we think that the international comity issue here is much easier than that in say the Bank of Nova Scotia cases that involve subpoenas for bank records that are overseas where U.S. courts routinely say that even though there is a bank secrecy law in Germany or in the Cayman Islands, the grand jury in America has a right and a duty to investigate serious crime. And the American court applies U.S. law to allow that.

Here, of course, this isn't, these aren't records overseas. We don't see a violation of Islandic law. And a fortiori, we think international comity does not block the right of the Government to investigate these matters.

THE COURT: All right. Thank you.

MR. DAVIS: So, unless the Court has questions--

THE COURT: No, I have no further questions.

MR. DAVIS: Thank you.

THE COURT: I will hear argument on the motion to unseal.

MR. PETERSON: Good morning, Your Honor.

THE COURT: Good morning.

MR. PETERSON: Andy Peterson. Because I have the benefit of going last, I will also try to bear the burden of being brief.

THE COURT: Okay.

MR. PETERSON: At root, the subscribers basically want to turn the common law right of access to judicial documents into a right to notice when a 2703(d) order or other process has been issued against them.

Even if that common law right of access exists, it doesn't require unsealing the sealed application in this instance or, to the extent they exist, other sealed records when a criminal investigation is ongoing long before any charging decision is made.

I think that's supported by clear Fourth Circuit case law. In the Baltimore Sun case cited by the movants, the court said that a search warrant affidavit after it's executed-- And clearly there is some public notice after the execution of a search warrant-- In fact, the aggrieved party may know that the search has occurred. But sealing of the affidavit can be justified long past the execution of the warrant because it can disrupt ongoing investigations or it may describe continuing investigations.

In addition, in Media General Operations versus Buchanan, the Fourth Circuit also acknowledged that a search warrant affidavit could be sealed because it could contain

sensitive details of ongoing investigations.

And at least as to the affidavit, which is a document, or the application which the Government acknowledges exists, we think that those harms are present here. That application, the release of it, it contains, obviously as has been described and the statute describes, a specific, a statement of specific and articulable facts regarding why the records sought are relevant to the investigation. Release of those facts, and those facts have not been made public, would damage the ongoing investigation.

The Virginia Department of State case which is cited by the movants actually recognized that one compelling government interest that's justified in protecting is the protection of facts in an investigation that had not been made public.

And that case which they rely on significantly is quite different from the case here. It was a civil action brought by a person who had been wrongfully imprisoned. And the documents at issue had actually been discovered to the plaintiff under a protective order. And in the midst of litigation, the Government had waived or at least publicized a number of those documents already.

And that's not what we have here. The movants have said that the Government in agreeing to the release of the original order had waived any harm that could come, but the

facts that are in, the specific and articulable facts as pointed out by Your Honor are of a different kind than what has already been released. And it's the Government's position, and we think well supported by the case law, that the release of those facts would cause damage to the ongoing investigation.

There is no procedural error here because there is no argument, at least not in oral argument, that the 2703(d) proceeding is conducted ex parte. And Baltimore Sun indicates that when that type of proceeding occurs, and this is consistent with Local Rule 49, that when a sealing order is issued, it's issued after the judicial order is entered and docketed that shows its nature as a motion to seal.

That's basically what occurred in this case briefly on the docketing issue. It's unclear to me at least when you go to the public docket now and enter this case number in, you get a response of under seal. And that's all that the public is entitled to in the sense that when a pen register is docketed or a search warrant, and that's exactly what was at issue in Media General Operations. What's usually docketed is simply the application and the order. There is no back and forth. It is an ex parte hearing.

The public docket indicates that a sealing order has been filed. And that's sufficient under Federal Rule of Civil Procedure or Criminal Procedure 55 and the Fourth Circuit

Court's decision in Media General Operations. In that case search warrants were docketed the same way by this Clerk's Office. A notation was made that a search warrant had been executed and that the affidavit was filed under seal. And that was sufficient public notice for the Fourth Circuit.

In terms of the presumption of access and the benefit to the investigation, I would just like to point out that this is substantively different from any of the cases that the plaintiffs have cited or the movants have cited about public access. It's in the middle of an investigation, in fact in the preliminary stages of an investigation.

And unlike a search warrant, the right that the plaintiffs assert, a search warrant is executed. And when the sealing order is docketed after the Government has collected the information, the aggrieved party can come back and litigate the issue.

Here the movants want to intervene prior to any collection or prior to actually the investigative tool issuing. And the Supreme Court in SEC versus O'Brien, as well as this court or the Fourth Circuit in In Re swearing in, held that even the existence of a right does not provide a substantive procedural right to notice that process has been issued.

We think that that applies to the other sealing orders to the extent they exist if they are out there. And

that the fact that unsealing of those documents would reveal public facts or facts that have not been made public is a sufficient compelling interest at this stage to keep the documents sealed.

THE COURT: All right, thank you. Did the petitioners have anything to add in rebuttal?

MR. KEKER: Yes, Your Honor. Briefly. I have got five points to respond to Mr. Davis. Let me start with the first one, which is standing which he raised, and I didn't, I didn't talk about.

The Government seems to think that you cannot challenge, make even a constitutional challenge to, as an aggrieved party to an order to compel production to a third party. That is simply wrong. Eastland versus U.S. Servicemen's Fund was cited in our brief.

But more importantly, the statute that he pointed to, 18 U.S.C. 2708, talks about these are exclusive judicial remedies for non-constitutional challenges. It should be, I believe, obvious that asking a court of the United States to stop something that has constitutional consequences and that may be unconstitutional, is something that a party has a right to do.

So, we think that their argument about the, about no standing is simply irrelevant and wrong.

The second point I wanted to make is the admission

that he makes. He said blithely after saying that you can't challenge what we're doing, he said of course a lot that we're subpoenaing is irrelevant, that's the way it always is when we send out subpoenas or do search warrants.

Well, we are looking at the words of the statute and the words of the Fourth Amendment and are making arguments based on that. The words of the statute, which they just want to blow off, say that what they subpoena, what they go get under a 2703(d) order has to be relevant and material to an ongoing investigation.

Imagine if you were sitting in a civil case or a criminal case and somebody comes to you with a Rule 17 subpoena and says, we want to subpoena this. And somebody cites the Nixon case and says, this has got to be relevant and material. It has to have some evidentiary impact. You'd say, well, no, you can't go on a fishing expedition under those circumstances.

If they want go on a fishing expedition, they should try to do it under a search warrant. They should try to do it with a subpoena. There are other remedies and there are other arguments there. This statute doesn't permit it.

The third point is that we seem to agree that the magistrate judge has discretion to deny, narrow, change an order that is sought under 2703(d).

They say that the Third Circuit's opinion in that

regard is wrong, it is going to be turned around, but we all seem to agree that there has got to be some discretion in the Court. And this goes back to the standing point. We're making a constitutional challenge. And what we're saying under-- As we've argued.

And they say there is no standing for anything other than a constitutional challenge and, therefore, we can't argue about the statute.

Whenever you make a constitutional challenge under the doctrine of constitutional avoidance, if there is some way to solve the case and get rid of the problem legally and properly that doesn't require you to make highfalutin constitutional rulings, then you should do it. And that's what we're arguing about here.

Then the fourth point, on to the Fourth Amendment. They say, don't worry about this, phone records and IP addresses are just the same. There is a couple of cases, Forrester and Christie, that say so.

Well, first, and we've argued this at length in the briefs, I won't go over it again, but let me just point out that Forrester and Christie are cases where what was being argued is you can't come and look at where I go on the Internet. You know, you go to my computer and what you do is put a register on it and you find out whether or not I go to porn sites or I go to this site or I go to that site. And,

therefore, I have an interest in that IP address.

We have argued that Forrester is wrong and Christie is inapplicable, but you don't have to go much farther than this to say neither of those cases deal with tracking somebody for a year or six months as they move from computer to computer, communicating with a wide variety of people. They just-- This is not a case about what Web sites you visited. This is a case about where you were when you made various kinds of speech, political and apolitical, relevant and irrelevant.

And the fact that some of this information, or even all of it, could under different, we talked about this before, conceptual circumstances be obtained by a search warrant, a subpoena, visual observation, other investigative means, is simply irrelevant to the question that we're raising. Which is, is this a search under the Fourth Amendment with all the rules that go with that?

And then the final point because you have been listening a long time patiently, and I'm sorry to go so long now, is on the First Amendment.

I mean, again, the Government, this is routine. There is no chilling effect they assert. This is not overbroad. They just assert.

We're not seeking membership lists. We're saying that you're getting affinity groups. They say, we're not

seeking membership lists. This is argument by assertion about why the First Amendment isn't implicated here. Don't worry about it, it's routine.

And we're rejecting that and arguing exactly the opposite. An argument by assertion really shouldn't decide this issue. If there is a First Amendment issue here, which there clearly at least potentially is, and the Court has questions about it or feels the need to reach it, we ought to have a hearing. We ought to find out what expectations are for purposes of the Fourth Amendment. We ought to find out about chilling effect for purposes of the First Amendment. We ought to find out about the Government's need for purposes of the First Amendment balancing. And so on.

They can't simply say, no chilling effect, not overbroad, we're not seeking affinity information, and so on. We're not affecting rights of association.

So, unless the Court has questions --

THE COURT: No, thank you.

MR. KEKER: -- that's it. Thank you, ma'am.

THE COURT: Did you have anything to add, Mr. Fine?

MR. FINE: Yes, Your Honor, briefly.

I just want to reiterate that there are two different types of documents that we're seeking to unseal here. There are judicial orders and there are the applications and any related affidavits.

With respect to the other judicial orders to other companies, the Government has failed to explain either in their papers or here today why it is in the best interests of the investigation to reveal the order to Twitter, but that they can't reveal the orders to other companies. They haven't explained why and they can't explain why. There is simply no difference.

The only potential risk that there could be to unsealing the other orders would be that the public would know who else has received these orders. But that's simply not a justification for maintaining secrecy. We have a presumption of open access for a reason. And just because the public doesn't know certain things is not a sufficient reason.

At a minimum, if the Court believes that there is some concern about exposing those third parties, there is a simple solution. The Court can unseal those other orders and simply redact the company names. We don't think that's necessary, but that's a clear, less restrictive alternative that the Fourth Circuit has made clear that this Court must adopt if it's present.

Second, we're not asking for a right to personal notice of all judicial orders or all applications and affidavits that the Government submits to the Court.

What the common law and the First Amendment require is that there be public notice of all judicial records. And

that hasn't occurred here, Your Honor. And that's not permissible.

There simply is not a public docket for each 2703 order that the Government has obtained. There may or may not be notice now of the Twitter order itself, but leave that order aside. We have got to focus in on all of the other orders. There is simply no public docket of those other orders. And the Fourth Circuit has made crystal clear that once matters are sealed, even in time sensitive, otherwise secret proceedings, there has got to be public dockets so that individuals have the right to, so that the public has a right to notice and an opportunity to challenge those sealing orders. That hasn't happened here and it has to happen.

Third, Your Honor, with respect to the affidavits, there are the applications themselves. The Government has to provide a specific justification to show why in these facts and in these circumstances this particular investigation will be compromised or jeopardized.

It is not enough to simply say, the other side doesn't know this information and, therefore, revealing it to them will damage our investigation.

Essentially what they're saying is, it will be harmful to our case if the other side knows information. But that's not how our system works. You don't get to keep information secret and hidden from the other side just because

you don't want to reveal it to them.

They have got to provide a specific reason why revealing those facts merits secrecy. They have got to show, it's going to tip off witnesses, they are going to flee if they know about this information. That's not present here. The Twitter order has already been unsealed. So, any of that risk would have already occurred.

They have got to show that evidence is going to be destroyed. Again, they haven't made that argument and they can't make that argument here.

With respect to the Media General case that the Government cites, Your Honor, that case is very, very different from this case. In that case--

THE COURT: I remember it.

MR. FINE: I am sure you do, Your Honor. I am referring to it by Media General. In that case everything was publicly available except for the Government's affidavit.

Here the Government wants to keep orders secret. That's a very different case, Your Honor.

In addition, there was public docketing in that case of every single sealing order. And thanks to the Court, the Clerk's Office made sure that there was public docketing of everything there, including the sealing order.

Here, again, all the other orders to other companies have not been docketed, and that's simply not permissible.

And, Your Honor, the Government essentially argues that this is just a routine case and that nothing new is going on here, nothing important is going on here, but this is anything but a routine case.

The case law makes clear there is a clear presumption of open access to all judicial documents. And for the Government to overcome that heavy burden, they have got to show that their interests heavily outweigh the public's interest and movants' interest. And it's not enough just to assert this general desire to keep information secret and hidden from the other side.

They haven't met their specific showing here in these specific facts. And, therefore, the clear presumption of access should win out and all these documents, both the other orders and the affidavits and applications, should be unsealed, Your Honor. And at a minimum, they all need to be publicly docketed.

THE COURT: All right, thank you very much.

MR. FINE: Thank you.

THE COURT: Mr. Cummings, they touched on your brief. Did you need to add any argument? The Government did.

MR. CUMMINGS: No, I think it is sufficiently stated in there, Your Honor. Thank you.

THE COURT: Okay. All right, thank you.

Well, everyone did an excellent job in argument, I

really appreciate it. I am going to take it under consideration and issue an opinion.

Thank you.

MR. KEKER: Thank you, Your Honor.

NOTE: The hearing concluded at 11:42 a.m.

C E R T I F I C A T E of T R A N S C R I P T I O N

I hereby certify that the foregoing is a true and accurate transcript that was typed by me from the recording provided by the court. Any errors or omissions are due to the inability of the undersigned to hear or understand said recording.

Further, that I am neither counsel for, related to, nor employed by any of the parties to the above-styled action, and that I am not financially or otherwise interested in the outcome of the above-styled action.

/s/ Norman B. Linnell

Norman B. Linnell

Court Reporter - USDC/EDVA